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No. 687

Supreme Court of the United States

OCTOBER TERM, 1966

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANT ILLINOIS CENTRAL RAILROAD COMPANY IN OPPOSITION TO MOTIONS TO AFFIRM

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The position of the appellees who address themselves to the questions raised by this appeal comes to this: The Interstate Commerce Commission found that control of the C. & E.I. by the Missouri Pacific would

strengthen the financial position of the C. & E.I. and thereby improve transportation services and facilities and for that reason was "consistent with the public interest" (App. 2, p. 49a); that finding is within the Commission's competence, and nothing else in the case matters. That view ignores the fundamental issue that underlies the important questions presented on this appeal.

The Commission here concluded that the Missouri Pacific should be permitted to retain and to exercise control admittedly acquired in deliberate violation of an explicit statutory prohibition. The fundamental issue is whether in reaching this conclusion the Commission acted on a correct understanding of its own legal authority and whether it supported its decision with adequate findings that have a rational basis in the record.

Since Congress has seen fit to provide that it shall be unlawful for one rail carrier to acquire control of another without prior Commission approval, this issue cannot be dismissed as "collateral" merely because the Commission has made certain findings concerning improvements in transportation services and facilities. (MoPac Motion p. 9; cf. Gov't Motion pp. 7-8). The public interest standard of Section 5(2) comprehends law observance and enforcement as well as transportation benefits. Nor will it do to urge that the Commission has unfettered discretion to decline to consider intervening events that cast the gravest doubt on the validity of its conclusion that the critical financial situation of the C. & E.I. required the Commission to bless the Missouri Pacific's unlawful acquisition of control. (Gov't Motion pp. 15-16; MoPac Motion pp. 20-22).

I. The Commission Erred in Disclaiming the Power to Deny a Section 5(2) Application Because of a Section 5(4) Violation.

The Commission found that the Missouri Pacific had violated Section 5(4) of the Interstate Commerce Act by acquiring the power to control the C. & E.I. without the prior approval of the Commission. It said that despite the finding of a statutory violation "we are not free to summarily deny Missouri Pacific's application" for approval of its acquisition of control of the C. & E.I. (App. 2, p. 89a).

This was a holding that the Commission was not free to deny approval to an unlawful acquisition of control but was required as a matter of law to consider whether the illegal act would improve transportation services and facilities. The holding necessarily implies that the legal standard of Section 5(2) incorporates the public interest in law observance and enforcement only in a subordinate and limited degree and that the paramount question in any case of an unlawful acquisition of control is whether the illegal act will tend to improve transportation services and facilities. In thus holding that it must entertain and consider an application of a violator of Section 5(4), filed and prosecuted during the period of violation, for authority to retain the benefits of the violation, the Commission denied itself legal authority to adopt a simple and effective means of vindicating the public interest that lies in compliance with the statutory requirement of prior approval of carriers' acquisitions of control of other carriers, *i.e.*, the denial at the threshold of an application for approval submitted after an illegal acquisition. The question presented is whether the Commission has the authority to regard a grave and deliberate violation of the law as in itself decisive.

We submit that the Commission's resolution of this question against its own authority finds no support in the words or policy of the statute and is inconsistent with the pronouncement of this Court in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 128.

The court below did not even advert to the question. Nor does the Government in its motion to affirm here. The Government instead erroneously imputes to appellants the argument that the Commission legally was bound to deny the Missouri Pacific's application because of its antecedent violation. (Gov't Motion pp. 8-10). Since appellants do not make this argument the Government's suggestion that it is answered by the opinion of this Court in *Gilbertville Trucking Co.* v. *United States, supra,* is irrelevant. Our argument is that the Commission erred when it held itself powerless under its statute even to consider whether it should deny the Missouri Pacific's application without more. Nothing in the *Gilbertville* case is inconsistent with that argument. Quite to the contrary, the Court said in *Gilbertville* that "an automatic rule [of disqualification of violators of Section 5(4)] is not necessarily arbitrary." 371 U.S. at 128.

The Missouri Pacific recognizes that the Commission held what appellees say it held and attempts to justify the holding. (MoPac Motion pp. 11-12). The appellee Leighton also tries to justify the holding but implies, alternatively, that the Commission did not mean what it said and asserts that "the Commission does not need a judicial pronouncement on the subject of its power." (Leighton Motion pp. 6-7). It is to be noted that Mr. Leighton points to no findings or language in the Commission's report that provide support for his attempt to rewrite the Commission's report. Mr. Leighton's attempt to support his revision by reference

to a passage in the Commission's report in *Central of Georgia Ry. Control,* 307 I.C.C. 39, 42 (1963), is not apt. In that passage the Commission did not hold that it lacked authority to deny the application of one who had acquired control unlawfully but on the contrary observed that an illegal acquisition of control did not "necessarily" bar approval of an application—a statement with which appellant does not disagree.

In support of the Missouri Pacific's sole argument on this score and Mr. Leighton's principal argument—that the Commission was correct in ruling that in a proceeding under Section 5 of the Act it must consider the transportation service aspects of an application for approval of control regardless of a prior violation of the statute—the appellees rely on two points.

The first is that the Commission is bound to consider what will best serve the public interest. This is nothing more than a question-begging restatement of the basic issue since that issue is whether the Commission has statutory authority to regard the public interest in law enforcement and observance as decisive. With respect to this point the appellees purport to find support in *Gilbertville Trucking Co.* v. *United States, supra,* but the Court in *Gilbertville,* as we have said, indicated very plainly that a rule disqualifying Section 5 violators from approval of the transaction to which their violations were related is consistent with the statute. The other assertion relied upon by these appellees is that the question of the Commission's power posed here was decided by this Court in *Alamo Express, Inc.* v. *United States,* 382 U.S. 19, *affirming* 239 F. Supp. 694 (W.D. Tex. 1965). But the argument made in the district court and on the appeal to this Court in that case was not that the Commission

erroneously disclaimed power to deny a Section 5 violator's application without more but that in the circumstances of that case the Commission erred in granting a control application despite a violation.

The Missouri Pacific ignores the ruling of the Civil Aeronautics Board that the procedure contemplated by its "Sherman doctrine" is "an appropriate one" under Section 408 of the Federal Aviation Act, whose terms are drawn very largely from Section 5 and which is the same in its purpose. *Sherman, Control and Interlocking Relationships,* 15 C.A.B. 876, 881 (1952).

Mr. Leighton describes the CAB rule as a "Draconian automatic rule," thus recognizing that the nature of that rule is correctly described in our jurisdictional statement.[1] Mr. Leighton attempts, how-

[1] The Government, on the other hand, asserts that "no regulatory agency in fact follows a rule of absolute disqualification" and attempts in a footnote to make it appear that in its statement and application the Sherman rule of the CAB is consistent with the holding of the Commission here that it has no authority to deny an application simply on the ground that control was acquired in violation of the statute. (Gov't Motion p. 9 & n.10). In this respect Mr. Leighton is correct, and the Government is wrong. It is one thing to say, as the CAB has, that an application for approval will not be considered so long as an illegal relationship continues save in exceptional circumstances, that the agency will not consider circumstances in mitigation of violations, and that the creation of a voting trust will not be regarded as eliminating or mitigating an illegal control relationship. It is quite a different thing to say, as the ICC said here, that it has no statutory authority to deny an application on the ground that control was acquired in violation of the statute but must in every case consider whether the illegal act will result in transportation benefits. The fact that the CAB leaves room for waiving its rule in "exceptional circumstances" by no means assimilates its rule to the holding of the ICC here.

ever, to dismiss the relevance of the CAB rule on the ground that rail and motor transportation differs from air transportation. (Leighton Motion p. 8, n. 9). Mr. Leighton does not explain why the public interest in law observance and enforcement is any less in the case of rail and motor transportation than it is in the case of air transportation. In any event his argument misconceives the nature of the question posed. That question, it bears reiteration, is not whether the Interstate Commerce Commission must adopt the CAB rule but whether it has legal authority to do so. The Commission has decided this case on the assumption that it lacks that authority. We submit that in disclaiming the authority the Commission erred, and this Court said as much in *Gilbertville*. The question should be resolved.

II. The Missouri Pacific's Violation Was Deliberate, Flagrant and Continuing.

Certainly if the Commission had considered itself free in any circumstances to debar a Section 5(4) violator it might appropriately have applied that sanction against the Missouri Pacific in this case. The Missouri Pacific's violation was deliberate, and none of the factors relied upon variously by the Commission, the court below and now the parties to the appeal in this Court as having mitigated the violation in fact were mitigating factors at all.

It is not at all clear indeed just why the parties regard the violation of Section 5(4) by the Missouri Pacific as anything less than deliberate and flagrant—or even that they do so regard it.

The Missouri Pacific states that its violation of Section 5(4) was "inadvertent," but on the same page

of its motion it states that the purchase of securities by which control was illegally acquired was undertaken "as a prelude to its application for control of C&EI"—which makes clear that the only possible inadvertency lay in the Missouri Pacific's buying more securities, at a premium, than it really wanted to buy. (MoPac Motion p. 15). The Government characterizes the Missouri Pacific's violation of Section 5(4) as "relatively minor" without attempting to give any specific content to either the adverb or the adjective. (Gov't Motion p. 9). Elsewhere the Government apparently recognizes that this palliative characterization could not apply to the unlawful actions of the Missouri Pacific in the eight-month period that preceded the creation of the voting trust. It concedes that had the Missouri Pacific revoked the voting trust of the securities whose ownership gave rise to the "relatively minor" violation it would have been "a flagrant violation of Section 5(4)." (Gov't Motion p. 10).

The Government's argument that the violation of the law was "relatively minor" completely ignores the preclusive effect of the initial illegal acquisition of the securities—an effect that was not in any practical sense dissipated by the subsequent creation of the voting trust. There was testimony before the Commission that the Missouri Pacific acquired the stock unlawfully for the specific purpose of keeping it out of the hands of others. (Tr. 2285). The record demonstrates that the illegal acquisition achieved that purpose because it gave the Missouri Pacific a preferred position in its efforts to attain control of the C. & E.I. It is no answer to say, as the Missouri Pacific does, that the illegal acquisition did not discourage the

Illinois Central. (MoPac Motion p. 15). The situation cannot be viewed as involving merely a contest between the Missouri Pacific and the Illinois Central. There was evidence, including testimony of the president of the C. & E.I., that other carriers were interested in control of or merger with the C. & E.I. but that they terminated their conversations with that carrier after the Missouri Pacific made its original acquisition of securities. (Tr. 2627, 4830). As a practical matter the acquisition gave the Missouri Pacific effective power to veto any arrangement that the C. & E.I. might have reached with these other interests. In its findings the Commission did not even consider this aspect of the conduct of the Missouri Pacific but appears simply to have assumed that the initial acquisition of the securities was devoid of any practical consequences.

With respect to the situation that existed after the creation by the Missouri Pacific of a voting trust, which was the principal factor in mitigation relied upon by the two tribunals below, the parties manifest the same kind of confusion.

The voting trust was found by the Commission to be irrevocable as a matter of law, and, as we have pointed out in the jurisdictional statement, for this reason among others the Commission concluded that the trust effectively insulated the Missouri Pacific from control of the C. & E.I. The District Court did not decide whether the Commission was correct in its legal conclusion. The Missouri Pacific urges that this Court now decide this question of law—a question which we submit the dissenting judge below correctly regarded as critical to the Commission's decision—and decide it favorably to the Commission on the basis of the motion

papers, on the basis indeed of a single footnote in the Missouri Pacific's motion. (MoPac Motion p. 17 n.*).[2] The Government, on the other hand, says that the legal question is of no moment because the contingency of revocation is a "remote one." (Gov't Motion p. 10). The Missouri Pacific also urges this ground alternatively. It is enough to say that the Commission could have decided the matter on that ground, but it very plainly did not do so. Its decision cannot therefore be sustained on that ground. *SEC* v. *Chenery Corp.*, 318 U.S. 80.

All of the appellees gloss over or ignore the fact, which was also ignored by the Commission, that regardless of the revocability of the voting trust even after its creation the situation that caused the Commission to find a violation of Section 5(4) persisted. That situation was the holding by the Missouri Pacific of

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[2] The Missouri Pacific refers to (1) a New York voting trust statute, N.Y. Stock Corp. Law § 50, that deals only with New York corporations, of which the C. & E.I. is not one, and that was not in any event complied with (*e.g.*, in its provision that trusteed stock is to be surrendered and new certificates issued to the trustee); (2) Hearst v. American Newspapers, Inc., 51 F. Supp. 171 (D. Del. 1943), distinguished in our statement (p. 27 n.11); (3) decisions of this Court standing for the general proposition that in some circumstances a person may be estopped to act inconsistently with a representation he has made, a proposition not usually applied to representations as to legal conclusions such as irrevocability of a trust; and (4) *In re* Mordecai's Trust, 24 Misc. 2d 668, 201 N.Y.S.2d 899, *aff'd*, 12 App. Div. 2d 449, 210 N.Y.S.2d 478 (1960), holding that when a trust is stated to be irrevocable without the consent of the trustee, as is not true here, such consent must be had even though the settlor is the sole beneficiary. Compare Stover v. Garber, 25 App. Div. 2d 488, 266 N.Y.S.2d 623 (1966). At the very least it is plain that the question of the revocability of the Missouri Pacific's voting trust cannot be summarily answered on the basis of the authorities it cites.

enough of the C. & E.I.'s securities to permit it to veto a merger or lease or sale of the carrier's assets.

This condition persisted after creation of the voting trust because, contrary to the Government's assertion that "no limitations or restrictions were imposed on the trustees' authority to vote the securities independent of the settlors" (Gov't Motion p. 4), the Missouri Pacific's voting trust instrument provided that the trustee should not vote at all for the acquisition of control of the C. & E.I. by the Missouri Pacific "or by any other company except as may be permitted or authorized by the Interstate Commerce Commission or required by a court of competent jurisdiction." (MoPac Motion App. 8). Without the affirmative vote of the Missouri Pacific's securities, transactions amounting to acquisition of control of the C. & E.I. could not be approved or consummated. The quoted instructions to the trustee in the trust instrument effectively vetoed all such transactions except in the limited circumstances described in the instrument.[3]

Finally, with respect to the nature of the Missouri Pacific's violation of Section 5(4), the appellees do not face up to the District Court's analysis of the acquisition by and on behalf of the Missouri Pacific, after the voting trust was created, of additional securities, increasing its control over the C. & E.I. The District Court concluded that for a period prior to their outright purchase by the Missouri Pacific and their placement in the voting trust certain of such securities, representing 32 per cent of the stock interest of the

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[3] The Interstate Commerce Commission has no statutory power to pass upon a non-carrier's merger with or acquisition of control of the C. & E.I., and thus it could not permit or authorize it.

C. & E.I., must be ascribed to it directly because of options it had to buy them from investment banker associates. (App. 1, pp. 20a-21a).

The Appellees scarcely advert to the District Court's analysis. Rather, they rely upon and attempt to embellish the Commission's bare assertion, in denying petitions to reopen the record to receive evidence concerning the additional acquisitions, that the matter was rendered moot by the fact that upon their outright purchase the securities did go into the voting trust.

One embellishment is the Missouri Pacific's assertion that the evidence that was the subject of the petitions to reopen was already in the record before the Commission merely because the Missouri Pacific had reported, to the Commission and the parties to its proceeding, the outright purchases of securities when they were made. (MoPac Motion p. 19). This is an odd view of what is included in an evidentiary record, and it is a view that the Commission did not take.

The Commission simply denied the petitions to reopen as moot. The District Court embroidered upon this spare denial by saying that the Commission "was entitled to consider" the power inherent in the optioned securities and the conditions under which the Missouri Pacific had access to them. (App. 1, p. 21a). The Missouri Pacific goes one unjustifiable step farther and asserts that "[t]he District Court and the Commission recognized" that there were conditions upon the access of the Missouri Pacific to the power represented by the securities. (MoPac Motion p. 20). The Commission recognized no such thing. It denied the petitions to reopen to receive evidence concerning the Missouri Pacific's subsequent securities acquisitions

on the sole ground that the matter was moot because upon their purchase the securities were placed in the voting trust. There is no indication in the Commission's report that it considered at all whether prior to its purchase of the securities the Missouri Pacific's holding of the options constituted a Section 5(4) violation, much less that it decided that there was no violation because it "recognized" that there were limitations upon the railroad's access to the optioned securities.

Once the District Court discerned, as the Commission had not, that there was a basis for finding a violation of Section 5(4) by reason of the Missouri Pacific's holding of the options, it was not entitled to determine *de novo* whether there had been such a violation on the basis of matters that the Commission "was entitled to consider" but that in fact it did not consider. It is an elementary principle of judicial review that an agency order must stand or fall on the grounds given by the agency and that it cannot be sustained on grounds subsequently invented by counsel or a reviewing court. In the circumstances, the District Court should have returned the case to the Commission so that the matter of the options could be considered by it.

III. The Commission Erred in Blinding Itself to the Recovery of the C. & E.I.

The basis for the Commission's judgment that the public interest required another carrier to have control of the C. & E.I. was in findings concerning the C. & E.I.'s unfortunate financial results in 1959, 1960 and 1961. At most the Commission saw a trend that culminated in those years. We submit that this is apparent from a fair reading of the Commission's report.

(See App. 2, pp. 104a-09a, 118a-19a, 180a-88a, cited in MoPac Motion p. 21). In an order entered long after it issued its report the Commission said that its judgment was based on the C. & E.I.'s long-term history. (MoPac Motion App. p. 17). However often the appellees repeat that statement, it does not jibe with what the Commission emphasized in its report as the determinative findings. These were that the C. & E.I.'s situation had progressively worsened until it had become critical in the latest years reflected in the record. In subsequent years, as parties offered to prove on their petitions for rehearing, the C. & E.I.'s situation had changed markedly. Another and quite opposite trend had begun. In these circumstances the Commission was bound to reopen the record to enable itself to determine in light of current facts where the public interest lay.

In saying this, we recognize that agencies must have a large measure of discretion in passing upon petitions to reopen the records of proceedings before them. *ICC* v. *Jersey City,* 322 U.S. 503, 514-16. But there are situations in which circumstances have so changed that it is an abuse of an agency's discretion to decline to reopen to consider the changed circumstances. *Atchison, T. & S.F. Ry.* v. *United States,* 284 U.S. 248. We submit that this case presents one of those situations.

First, there is no doubt of the significance that the Commission attached to the condition of the C. & E.I.; if that condition is not as the Commission saw it, its decision rests on a false premise. Secondly, action authorized by the Commission in this case is final. It is unlike a case involving rates, for example, over which the agency may maintain a continuing surveillance, making the necessity less that it reopen any particular

rate proceeding to bring itself current. And finally, there is the fact that in this case the supposed emergency of the C. & E.I. was treated by the Commission as a compelling reason for delivering the carrier to the Missouri Pacific despite the latter's violation of the law; the violation was forgiven in large part because the Commission thought that the C. & E.I. was in irremediable crisis. (App. 2, pp. 89a-91a).

In fact there was no urgent crisis at the time the Commission spoke; there is none now. The C. & E.I. did not regard itself as an emergency case at the time of the Commission's decision. It was aptly described by a dissenting member of the Commission as "an exceedingly reluctant bride . . . [which] contends that the circumstances of 1960, upon which the majority bases its decision, have changed so radically as to make our record in these cases obsolete." (App. 2, p. 95a). Nearly two years later, in this Court, the C. & E.I. in its short motion to affirm does not urge that any dire consequences will result if control does not speedily pass to the Missouri Pacific.

Moreover, in contending that the questions raised by the appellant Monon in No. 689 are raised prematurely, the appellees emphasize that conditions in railroading change. The appellee Louisville & Nashville even criticizes the Monon's diversion estimate on the ground that the base period for it was 1961, "when the railroads' share of intercity traffic and the level of economic activity were lower than in recent years." (L&N Motion p. 7). The C. & E.I. has shared in the recovery of the railroads in the years since 1961, which was also the last year of its operation that was reflected in the record before the Commission. There is no longer any emergency.

CONCLUSION

The ultimate question placed before this Court by the Illinois Central is not whether it or the Missouri Pacific should be allowed to acquire control of the C. & E.I. There are other possibilities of consolidation as well as the possibility of maintaining the C. & E.I. as an independent bridge carrier. A reversal of the judgment below on the grounds urged here would result simply in the case being returned to the Commission for a fresh consideration of problems of the C. & E.I. free from the effects of the Missouri Pacific's illegal acquisition. The questions to be answered in determining whether such fuller consideration should be had are substantial. Probable jurisdiction should be noted.

Respectfully submitted,

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